

STATE OF MICHIGAN
COURT OF APPEALS

METRO TRAFFIC CONTROL, INC.,

Plaintiff-Appellant,

v

EXPRESS MORTGAGE,

Defendant-Appellee.

UNPUBLISHED

July 7, 1998

No. 202871

Oakland Circuit Court

LC No. 96-534260 CK

Before: Murphy, P.J., and Young, Jr. and M. R. Smith*, JJ.

MEMORANDUM.

Plaintiff appeals as of right from the summary dismissal of its breach of contract action. MCR 2.116(C)(8). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

No contract can arise except on the expressed mutual assent of the parties. *Brown v Considine*, 108 Mich App 504, 507; 310 NW2d 441 (1981). A contract is made when both parties have executed or accepted it, and not before. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992); *Brown, supra*. If one of the parties is wanting, there is an absence of one of the formal constituents of a legal transaction, and there is no contract. *Brown, supra*, 507-508.

Plaintiff's complaint alleges that it contracted with defendant "for advertising." Plaintiff appended to its complaint a written instrument that it claims constitutes the contract upon which the instant suit is brought, thereby making the instrument part of the complaint "for all purposes." MCR 2.113(F); *Soloman v Western Hills Development Co*, 88 Mich App 254, 256; 276 NW2d 577 (1979). At the bottom of this instrument, directly under the lines meant for the signatures of two of plaintiff's officers, the following language appears: "NOTE: This agreement shall not be binding on MTC unless signed by two officers of MTC." The absence of the signatures of two of plaintiff's officers, by operation of the very terms of the instrument, conclusively evidences a lack of acceptance on plaintiff's part of the terms set forth in the instrument. Stated another way, plaintiff's failure to sign the instrument, by operation of the terms of the instrument, means one of

* Circuit judge, sitting on the Court of Appeals by assignment.

the parties to the agreement (plaintiff) is wanting and, therefore, that no contract existed. *Brown, supra*, 507-508. Accordingly, accepting all the factual allegations in the complaint as true, plaintiff's breach of contract claim is so unenforceable as a matter of law, there being no contract to breach, that no factual development could possibly justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995).

Additionally, the trial court did not abuse its discretion by refusing to allow plaintiff to amend its complaint. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 343; 568 NW2d 847 (1997). Plaintiff asked the court to allow plaintiff the opportunity to amend its complaint only so that plaintiff could identify "the name of a specific party that would benefit from the contract." Such an amendment would not cure the defect existing in plaintiff's complaint by providing factual allegations that, when taken as true, would establish the existence of a contract between plaintiff and defendant. Accordingly, plaintiff's desired amendment would have been futile. The trial court was not required to allow futile amendments. *Traver Lakes, supra*.

Affirmed.

/s/ William B. Murphy
/s/ Robert P. Young, Jr.
/s/ Michael R. Smith